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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 239

R. LEO SCHWARZ,
Petitioner,

vs.

VICTOR WEST,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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Respondent's Brief in Opposition further illustrates the confusion that exists relative to the jurisdictional question presented in this case. Reply is made to the pertinent points only.

I.

(Reply to Respondent's Point I, pp. 6-9.)

Although respondent in his complaint (T. 2) stated that jurisdiction to hear the case was granted to the district court by section 205 of the Housing and Rent Act of 1947, he now urges that Section 1331 of the Judicial Code and the said Rent Act granted jurisdiction. (Brief, p. 6.)

A reading of the *Adler* case and the *Fields* case will readily show that a conflict, in fact, does exist. In the *Fields* case the court, in the first paragraph of its opinion, states that the suit is filed under section 205 of the Rent Act; in the second paragraph section 205 is set out; in the third paragraph the court holds that the Rent Act does not confer jurisdiction on the district court to hear a treble damage case under the Act; and observes that it must look elsewhere; the court then considers the provision of the Judicial Code and concludes that the district court had no jurisdiction to hear the case because the requisite jurisdictional amount was not involved. The court clearly held that the Rent Act did not grant jurisdiction to the district court to hear the case. In the *Adler* case the court states that there were numerous plaintiffs but that none of their claims exceeded the jurisdictional amount; the aggregate of their claims did exceed this amount, however; the majority opinion held that the Rent Act did grant jurisdiction, while the dissenting opinion of Justice Minton held that no jurisdiction was granted the district court; because of this conclusion of the majority there was no need to consider whether the requisite jurisdictional amount existed or whether there was a federal question involved in the case. Respondent is in error when he says (Brief, p. 8) that both cases were based on the reason that less than $3,000.00 was involved because the *Adler* case did not consider the Judicial Code provision. It is submitted that if the Rent Act grants jurisdiction the amount involved is not material.

Furthermore, if the courts are in hopeless confusion in their interpretation of the *Adler* and *Fields* cases (as indicated by Respondent's Brief, pp. 8-9), there is need for this court to clarify the matter in the exercise of its power of supervision over Federal courts.

There can be no question that there is a conflict in the

cases as to whether the Rent Act does grant to the district courts jurisdiction to hear treble damage cases. The consideration of the Judicial Code becomes necessary after the determination is made that the Rent Act does not grant jurisdiction. The respondent when he filed his complaint rested his jurisdictional statement on the short sentence: "Jurisdiction of this action is conferred upon this court by Section 205 of said Rent Act." (T. 2.) The complaint had no other allegation that expressly or inferentially related to the matter of jurisdiction. The *Fields* and *Adler* cases are clearly in direct conflict as to whether this statute grants jurisdiction to the district court.

II.

(Reply to Respondent's Point II, pp. 9-12.)

Respondent's argument in support of the decision below in holding that the trial court had jurisdiction is based on one point: that the filing of a suit to enforce a cause of action created by an Act of Congress by necessity, is a case under the laws of the United States. In support of this view Respondent quotes from a number of decisions involving the Rent Act (Respondent's Brief, p. 11) but fails to observe that in none of those cases did the parties urge that the suit did not arise under the Constitution, laws or treaties of the United States and consequently the statements of the court are dictum. It is significant that while Respondent finds fault (Brief, p. 10) with the "generality" of the language of certain cases cited by Petitioner, that the Respondent was unable to cite one case supporting his contention that the mere creation of a cause of action by Act of Congress grants jurisdiction to the district court to hear the case. In urging this view on the court the Respondent overlooks the well established rules of law that when Congress creates a new cause of action

it may also provide the remedy and that remedy is exclusive.

The two cases cited by Respondent (p. 10) in support of his contention that the creation of the cause of action by Congress makes this case one "under a law of the United States" do not support this view. *Bell* v. *Hood*, 327 U. S. 678 and *Gully* v. *First National Bank in Meridian*, 299 U. S. 109, were not cases based on causes of action created by Congress. The *Bell* case involved the question "whether federal courts can grant money recovery for damages said to have been suffered as a result of federal officers" (327 U. S. 678, 684); the *Gully* case was a suit to recover taxes; this court in holding that the district court had no jurisdiction relied, in part on the *Shulthis* case by quoting from this cause (299 U. S. 109, 114) and then saying: "not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit." The quotation at the bottom of page 10 of Respondent's Brief is from *Puerto Rico* v. *Russell Co.*, 288 U. S. 476, which held that the district court did not have jurisdiction to hear the case merely because the bank had been organized under a Federal charter.

This court in *Gold-Washing & Water Co.* v. *Keyes*, 96 U. S. 199, observed that plaintiffs (pp. 202-203) "claim the right to this use under the provisions of certain specified acts of Congress," and then held that a Federal court does not have jurisdiction unless the right sought to be protected depends upon the construction or effect of the Constitution or law of the United States.

In *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505, this court considered the question whether a suit brought under a cause of action created by a Federal statute (the mining law which permitted "adverse suits" under the act to be filed "in any court of competent jurisdiction") of itself conferred jurisdiction on Federal courts; this court held

(p. 507) "that a suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the Constitution or laws of the United States, within the meaning of the jurisdiction clauses." This court observed (p. 509) that a case that presents a mere question of fact does not necessarily create a Federal question.

Respondent's strained contention (Brief, p. 12) that "this case might have involved" a federal question is untenable. It is not enough that the constitutionality of a statute or that its construction "might" be involved, but these questions must really exist. This court in *Newburyport Water Co.* v. *Newburyport,* 193 U. S. 561, 576 said that "jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, if it plainly appears that such averment is not real and substantial, but is without color of merit." The matters relating to jurisdiction must clearly appear, and it is not sufficient that jurisdiction may be inferred argumentatively (*Hanford* v. *Davies,* 163 U. S. 273, 279-280). Nor can the district court retain jurisdiction in order to ascertain whether a federal question will eventually develop in the suit (*Florida Central & Peninsular Railroad Co.* v. *Bell,* 176 U. S. 321, 327-328). In *Shoshone Mining Co.* v. *Rutter,* 177 U. S. 505, this court held that the mere fact that a suit was filed pursuant to the Mining Act passed by Congress did not confer jurisdiction on the Federal Courts to bear the case. And in *Cuyahoga Co.* v. *Northern Ohio Co.,* 252 U. S. 388, 397 this court observed that a federal question must be not a matter of form but substantial, not a mere assertion but must exist in essence and effect. And in *Marshall* v. *Desert Properties Co.,* 103 F. 2d 551, cert. denied 308 U. S. 563, the court stated (pp. 552-553):

> "Where there is no dispute between the parties as to the meaning of any Federal Law, *but the case in-*

> *volves merely issues of fact,* the case is not one arising under the constitution or a law or treaty of the United States, although the respective interests or titles of the parties may be derived through some constitution, law or treaty." (Italics added.)

(To the same effect see *Shoshone Mining Co.* v. *Rutter,* 177 U. S. 505, 509). In the case at bar the right or cause of action is derived from a Federal law, but only a question of fact was involved (as clearly set forth in Respondent's Brief, p. 5) and therefore no Federal question was involved.

Conclusion.

In view of the confliction that exists in the cases on the question presented there is a need for a clarification by this court. With the numerous cases still pending and the number that will undoubtedly be filed in the future there should be a final determination of the question by this court to the end that litigants and the trial courts may guide themselves accordingly.

Respectfully submitted,

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